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09 284,816	06/14/1999	PHILIPPE MAI CORPS	09 260	2849

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BACHMAN & LAPOINTE  
900 CHAPEL STREET SUITE 1201  
NEW HAVEN, CT 065102802

[REDACTED] EXAMINER

SHERER, CURTIS EDWARD

ART UNIT	PAPER NUMBER
1761	2

DATE MAILED: 05/09/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No. 09/284,816	Applicant(s) Malcorps et al.
Examiner Curtis E. Sherrer	Art Unit 1761



The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

1)  Responsive to communication(s) filed on Apr 11, 2002

2a) This action is FINAL.                            2b)  This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

### Disposition of Claims

4)  Claim(s) 40-63 is/are pending in the application.

4a) Of the above, claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

5) Claim(s) \_\_\_\_\_ is/are allowed.

6)  Claim(s) 40-63 is/are rejected.

7) Claim(s) \_\_\_\_\_ is/are objected to.

8) Claims \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on \_\_\_\_\_ is/are objected to by the Examiner.

11) The proposed drawing correction filed on \_\_\_\_\_ is: a) approved b) disapproved.

12) The oath or declaration is objected to by the Examiner.

### Priority under 35 U.S.C. § 119

13) Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).

a) All b) Some\* c) None of:

1. Certified copies of the priority documents have been received.
2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

### Attachment(s)

Notice of Patentability - 104(a) & 112(e) - 104(b) & 112(f)

Notice of Draftsperson's Patent Drawing Review - PTO-948

Notice of Office Paper & Application Status - 104

**DETAILED ACTION**

***Claim Rejections - 35 USC § 112***

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

2. Claims 51 and 57 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

3. Claims 51 and 57 are indefinite because it is not clear how they further define the previous claims. Applicants respond in stating that the specification sets forth "that pectin may be used in the form of a crude or impure source as well as in the form of an industrial product such as pectin E440." This issue does not concern the purity or concentration of pectin, but rather the type of pectin. Pectin E440 is not an "industrial pectin" but rather a classification. Therefore, the rejection is maintained.

***Claim Rejections - 35 USC § 102***

4. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States

5. Claims 40, 41 and 43-63 are rejected under 35 U.S.C. 102(b) as being anticipated by New Glarus Brewing Company Apple Ale Beer (label)(hereinafter New Glarus) or Cock's Fine Brews (<http://www.notchturner.com/cocks/frutopen.htm>)(hereinafter Cock) in light of Ashurst (Production and Packaging of Non-Carbonated Fruit Juices and Fruit Beverages (pages 174-6). Additional Evidence has been supplied to show that Apple Ale was in production in 1995. See <http://www.newglarusbrewing.com/awards.html>.

6. New Glarus produces a beer called Apple Ale Beer. From reading the label it is disclosed that "Apple Ale sings with the fresh crisp taste of Wisconsin Apples. Our Brewmaster begins with a brown ale base employing Wisconsin farmed wheat and a blend of Cortland, Macintosh and Jonathan apples."

7. Cock discloses four recipes that all mix sliced apples or cider with malt and other ingredients. The recipes vary as when the apples or juice are added. e.g., some are added during the boiling, and some after. Therefore, it is considered that these would produce hazes as claimed.

8. Apples inherently contain large amounts of pectin. Evidence of this is found in Ashurst, who states that apple juice inherently contains .37 to 2.5% pectin (see page 176).

art process inherently anticipates the limitations directed to irreversible and reversible hazes.

Also see page 6 of the instant specification, whereby applicants admit that "pectin may be introduced in the form of a crude or impure source, such as a fruit fraction, extract or concentrate."

10. The Office does not have the facilities for examining and comparing Applicant's product with the product of the prior art in order to establish that the product of the prior art does not possess the same material structural and functional characteristics of the claimed product. In the absence of evidence to the contrary, the burden is upon the applicant to prove that the claimed are functionally different than those taught by the prior art and to establish patentable differences. See *In re Best*, 562 F.2d 1252, 195 U.S.P.Q. 430 (CCPA 1977); *Ex parte Gray*, 10 U.S.P.Q.2d 1922, 1923 (BPAI).

***Claim Rejections - 35 USC § 102/103***

11. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless --

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

12. Claims 40 and 42 are rejected under 35 U.S.C. 102(b) as being anticipated by, or in the alternative, under 35 U.S.C. 103(a) as being unpatentable over the well known mixed drink "Snakebite" for the reasons set forth in the last Office Action.

13. Applicants reply to this rejection by stating that it does not disclose making beer from a beer wort. It is notoriously well known that all beer is made from a beer wort.

***Response to Arguments***

14. Applicant's arguments with respect to the claims have been considered but are moot in view of the new ground(s) of rejection. The rejection based on Brasserie Achouffe has been dropped because it was not possible to determine when the brewery began making its apple beer.

***Conclusion***

15. No claim is allowed.

16. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Curtis Sherrer whose telephone number is (703) 308-3847.

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17. Any inquiry of a general nature or relating to the status of this application should be directed to the Group receptionist whose telephone number is (703) 308-0661.



Curtis E. Sherrer  
Primary Examiner  
May 3, 2002